

No. 80874-1

SUPREME COURT
OF THE STATE OF WASHINGTON

KATHIE COSTANICH,

Petitioner,

vs.

STATE OF WASHINGTON, DSHS

Respondent.

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STATE OF WASHINGTON
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REPLY IN SUPPORT OF DISCRETIONARY REVIEW

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A. Review Should Be Considered Under The Standards Of RAP 13.4.

RAP 12.3 defines a “decision terminating review” as an order by the appellate court that (1) is filed after review is accepted by the appellate court filing the decision; (2) terminates review unconditionally; and (3) is a decision on the merits. Here, the Court of Appeals decision modifying the commissioner’s award of attorney fees to petitioner was effectively an order granting reconsideration of its earlier decision awarding appellate fees to petitioner in its published decision. ***Costanich v. DSHS***, 138 Wn. App. 547, 564, ¶ 26, 156 P.3d 232 (2007). This Court should consider petitioner’s request for review under the standards of RAP 13.4 because the Court of Appeals decision denying petitioner’s request for attorney fees on appeal is essentially a “decision terminating review” under RAP 12.3.

In its published decision, Division One affirmed the trial court’s award of attorney fees to petitioner under RCW 4.84.350, and “for the same reasons” held that petitioner was entitled to attorney fees on appeal under RAP 18.1. ***Costanich***, 138 Wn. App. at 564, ¶ 26. The State did not move for reconsideration of the fee award. Petitioner thereafter submitted her fee request, to which respondent State also did not object. Only after the

commissioner awarded the requested fees did the State for the first time claim that petitioner was not entitled to attorney fees on appeal because she had already received the "statutory cap" in the superior court.

On the State's motion for modification of the commissioner's fee award, the panel who originally decided the case accepted the State's argument that RCW 4.84.350 limits an award of attorney fees to \$25,000 for all stages of review, and reversed the commissioner's appellate fee award. In doing so, the panel effectively granted an untimely motion for reconsideration of its earlier decision awarding appellate fees to petitioner.

The appellate court's order reconsidering its decision to award attorney fees to petitioner terminated review and was a decision on the merits. This Court should consider petitioner's request for review of this decision under RAP 13.4 as argued in the petition for review filed with this Court.

B. Discretionary Review Is Warranted If This Request For Review Is Considered Under The Standards Of RAP 13.5.

If review of the appellate court decision is considered under the standards of RAP 13.5, this Court should grant review under RAP 13.5(b)(2) because the Court of Appeals decision denying

appellate fees was probably erroneous and substantially limits the freedom of a party to act. By reconsidering its fee award on the State's motion to modify the commissioner's fee decision when the State had not previously filed a timely motion for reconsideration or objected to petitioner's fee request, the Court of Appeals also so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of revisory jurisdiction by this Court under RAP 13.5(b)(3).

1. Division One's Fee Decision Was Erroneous.

Division One's interpretation of RCW 4.84.350 limiting to \$25,000 an award of attorney fees to a prevailing qualified party who has been forced to defend against a position taken by the State that was "not substantially justified" at multiple levels of review is contrary to the legislative intent behind the EAJA and not compelled by the language of RCW 4.84.350.

"[S]tatutes are to be interpreted as they are plainly written, unless a literal reading would contravene legislative intent by leading to strained or absurd results." ***Marine Power & Equipment Co., Inc. v. Industrial Indem. Co.***, 102 Wn.2d 457, 461, 687 P.2d 202 (1984), *cited at* State's Answer 5. The EAJA was intended to ensure that "parties have a greater opportunity to

defend themselves from inappropriate state agency actions and to protect their rights.” Laws 1995, ch. 403 § 901 (legislative findings). RCW 4.84.350 entitles a “qualified party that prevails in a judicial review of an agency action” reasonable attorneys’ fees “unless the court finds that the agency action was substantially justified” and provides that “[t]he amount awarded a qualified party under subsection (1) . . . shall not exceed twenty-five thousand dollars.” RCW 4.84.350.

Division One’s supposed “literal reading” of the statute (one that is not apparent from its published opinion, of course, as the decision to deny fees was made on the State’s motion to modify an otherwise unchallenged fee award) would contravene the legislative intent to ensure that parties have an opportunity to defend themselves from unreasonable agency actions by awarding fees if they prevail:

The legislature finds that certain individuals, smaller partnerships, smaller corporations, and other organizations may be deterred from seeking review of or defending against an unreasonable agency action because of the expense involved in securing the vindication of their rights in administrative proceedings. The legislature further finds that because of the greater resources and expertise of the state of Washington, individuals, smaller partnerships, smaller corporations, and other organizations are often deterred from seeking review of or defending against state agency actions because of the costs for

attorneys, expert witnesses, and other costs. The legislature therefore adopts this equal access to justice act to ensure that these parties have a greater opportunity to defend themselves from inappropriate state agency actions and to protect their rights.

Laws 1995, ch. 403 § 901 (legislative findings). The plain language of the EAJA does not limit attorney fees to \$25,000 for all stages of review. The statute provides that “**a** court shall award a qualified party that prevails in **a** judicial review of an agency action fees and other expenses.” RCW 4.84.350 (em-phasis added). “A” is defined as “each; every; per” Webster’s New Universal Unabridged Dictionary (1996). A “plain reading” of the statute, consistent with the legislative intent, is that a party is entitled to attorney fees at *each* stage of review.

The State’s claim that this interpretation would lead to an “absurd result” because a party could collect fees if she prevailed in the superior court but lost in the appellate court (Answer 7) is without merit. If on appeal the superior court is reversed, and the appellate court determines that the respondent is not the prevailing party, the attorney fees awarded under RCW 4.84.350 will also be reversed. See e.g. ***Galvis v. Dept. of Transp.***, 140 Wn. App. 693, 712, ¶ 51, 167 P.3d 584 (2007) (“Because we conclude that the superior court erred in entering judgment on behalf of the property

owners, we also reverse its award of fees and costs [under RCW 4.84.350]”); **McFreeze Corp. v. Dept. of Revenue**, 102 Wn. App. 196, 201, 6 P.3d 1187 (2000) (reversing summary judgment order against the Department of Revenue, including the trial court’s award of attorney fees to the respondent). What is more absurd is a reading of the statute that absolves the State from any potential liability for appellate fees if, as in this case, it unsuccessfully appeals a decision for which a party has already received a fee award at the superior court level.

The State’s reliance on **Alpine Lakes Protection Society v. Dept. of Natural Resources**, 102 Wn. App. 1, 979 P.2d 929 (1999) (Answer 10) also is misplaced. The superior court in **Alpine Lakes** had awarded only \$7,500 in fees; the appellate court remanded for, among other things, a determination of whether the citizen organization was entitled to all or only a portion of this award because it had not prevailed on all issues. **Alpine Lakes**, 102 Wn. App. at 20. **Alpine Lakes** did not raise the same issues as this case, where the petitioner was awarded the “statutory cap” in judicial review in the superior court and then fully prevailed on appeal.

2. Division One's Decision Substantially Limits The Petitioner's Freedom To Act.

Division One's interpretation of the EAJA substantially limits the freedom of a party to act because as a practical matter it prevents a qualified party who prevailed in judicial review in superior court and was awarded the "statutory cap" from defending against the State's appeal of the superior court's decision, no matter how unjustified, because as respondent the party will have no way of recouping any further fees in the appellate court. This interpretation of the statute would allow an agency to pursue an unjustified position at successive levels of review with no fiscal consequence, directly contrary to the legislative intent behind the EAJA to prevent private parties from being "deterred from . . . defending against an unreasonable agency action because of the expense involved in securing the vindication of their rights in administrative proceedings." Laws 1995, ch. 403 § 901 (legislative findings).

3. Division One Departed From The Usual Course Of Judicial Proceedings.

Division One's initial decision, which did not address appellate attorney fees, was filed on January 29, 2007. Petitioner timely filed a motion for reconsideration requesting appellate

attorney fees under RCW 4.84.350. In response, and even though it was fully aware of the attorney fees that had already been awarded to petitioner in the superior court, the State never raised the issue of the "statutory cap." The State's sole argument on reconsideration was that DSHS's appeal was "substantially justified" and an appellate fee award therefore was not warranted.

On May 3, 2007, Division One reconsidered its decision and awarded appellate fees to petitioner, because "although DSHS was justified initially in its concerns about Costanich's use of profanity, the evidence before the ALJ shows that DSHS was not substantially justified in revoking her license once it became aware of the problems with Duron's investigation." *Costanich*, 138 Wn. App. at 564, ¶ 26. The State did not timely seek reconsideration of this decision under RAP 12.4. Nor did the State seek review in this Court under RAP 13.4.

Petitioner timely submitted her fee affidavit. Again the State did not object to the award or amount of appellate fees requested within the time allowed under RAP 18.1(e). On June 22, 2007, the appellate court commissioner awarded petitioner the fees she had requested.

On July 12, 2007, in a motion to modify, the State for the first time argued that an award of appellate fees was barred by the "statutory cap" in RCW 4.84.350 because petitioner had been awarded \$25,000 in the superior court. Although its published decision still recites that petitioner was awarded fees on appeal, the panel of Division One that on reconsideration had awarded appellate fees granted the State's motion to modify and reversed the commissioner's fee award.

Division One thus essentially reconsidered its previous decision, which was otherwise final because the State had not filed a timely petition for review, without a proper and timely motion for reconsideration. The State never sought an extension of time to have Division One's initial decision to award appellate fees to the petitioner reconsidered. An extension of time would not have been proper under RAP 18.8(b) (extension of time for a petition for review or a motion for reconsideration will only be granted in "extraordinary circumstances and to prevent a gross miscarriage of justice"). See ***Schaeferco, Inc. v. Columbia River Gorge Comm'n***, 121 Wn.2d 366, 368, 849 P.2d 1225 (1993) (dismissing appeal certified by the Court of Appeals "given the procedural failures of the case," including failure to timely perfect appeal without

demonstrating sound reasons to abandon preference for finality). By modifying the commissioner's award and denying petitioner her previously awarded fees on appeal, Division One "so far departed from the accepted and usual course of judicial proceedings" as to call for review in this Court under RAP 13.5(b)(3).

C. Conclusion.

This Court should grant review under RAP 13.4(b)(4), RAP 13.5(b)(2), or RAP 13.5(b)(3), reinstate the fee award in Division One, and award petitioner her fees and costs in this Court.

Dated this 27th day of December, 2007

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& GOODFRIEND, P.S.

By:  _____

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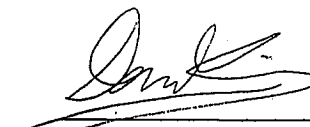
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 27, 2007, I arranged for service of the foregoing Reply In Support of Motion For Discretionary Review to the court and the parties to this action as follows:

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DATED at Seattle, Washington this 27th day of December, 2007.



Daniel F. King